IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
JAN 13 1976
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1975

NO. 75-840

BARBARA LEE SHIRLEY,
Petitioner,

v.

WILMET G. BURNS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For the Sixth Circuit

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STATEMENT OF THE CASE

The petitioner, Barbara Lee Shirley, was first employed as a physical education teacher by the Chagrin Falls Exempted Village Schools Board of Education for the 1970-1971 school year and was reemployed for the 1971-1972 school year.

At that time, the Board of Education had the following policy in effect:

"Section 320.03. In the case of pregnancy, the employee shall resign and/or her contract shall become null and void at the end of the fifth (5th) month of pregnancy, or at the end of a semester, whichever occurs first. Abuse of this policy will be a just cause to prevent future re-employment.

The employee will not be permitted to return to her former position earlier than three months following the birth of the child, and then only upon presentation of a physician's certificate that she is able, in all ways, to perform all the duties of her assignment. New applicants will not be considered for employment until this three months' period has elapsed following the birth, and the presentation of the necessary physician's statement."

This policy had been in effect and uniformly administered since 1964.

Petitioner discovered she was pregnant in November, 1971, and was due to give birth in June, 1972. The maternity leave policy was called to petitioner's attention by other school employees (who were not named as defendants), and she was asked for her resignation by the Assistant Superintendent, Mr. Loyal Cornelius. She voluntarily tendered her resignation effective March 1, 1972, which was rejected as not complying with the maternity leave policy. Upon request, petitioner subsequently submitted a second resignation and her last day of teaching was January 28, 1972, which

was the end of the semester. Following the birth of her child on June 21, 1972, she left the state and has not sought reinstatement as a teacher.

This action was filed by petitioner on April 4, 1973, in the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to 42 U.S.C. § 1983, alleging that the Board's policy violated her rights under the Fourteenth Amendment to the United States Constitution. She sought back pay, attorney's fees, costs, and other relief. Named as defendants in the complaint were the Board of Education as an entity, all members of the Board of Education as members and in their individual capacities, and Mr. Cornelius in both his administrative and individual capacities. The District Court subsequently dismissed the Board of Education as an entity, holding that the Board was not a "person" within the meaning of § 1983. That order was not appealed from by petitioner.

At the non-jury trial, the members of the Board of Education (hereinafter sometimes collectively referred to as the "Board of Education"), did not contend that their maternity leave policy was constitutional in light of this Court's holding in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). Rather, the Board raised as an affirmative defense a "qualified immunity" in that the action taken by them with respect to petitioner's resignation was consistent with and in conformity to the laws of the State of Ohio and the United States of America as interpreted in the judicial de-

cisions rendered at that time and was taken in good faith.

The maternity leave policy in issue here was substantially similar to that involved in La Fleur. On May 12, 1971, the United States District Court for the Northern District of Ohio, Eastern Division rendered its decision in that case to the effect that such policy was not violative of the female plaintiff's constitutionally protected rights. This was the law as it stood when the Board of Education requested petitioner's resignation in the instant case. La Fleur v. Cleveland Board of Education, 326 F. Supp. 1208 (N.D. Ohio 1971).

On July 27, 1972, the Sixth Circuit Court of Appeals issued its decision in La Fleur reversing the District Court, holding that the maternity leave policy did violate constitutionally protected rights. La Fleur v. Cleveland Board of Education, 465 F. 2d 1184 (6th Cir. 1972). At the next meeting of the Chagrin Falls Board of Education (August 14, 1972), a mere eighteen days after the Sixth Circuit decision in La Fleur, the Board of Education changed its policy to conform with the applicable law as determined by the Court of Appeals.

Upon these circumstances, the District Court granted petitioner a judgment for monetary damages against the individual board members in the amount of $1,037.25. The district judge acknowledged the availability of a qualified official immunity defense to the board members. However,

in analyzing the requirements for qualifying for that defense, the judge found that although the Board of Education had acted in undisputed good faith (Petition for Writ of Certiorari, pp. A-22,23), they did not have reasonable grounds to believe they were acting in conformity with the law as it then stood in interpreting petitioner's civil rights.

The District Court judgment was reversed by the Sixth Circuit in a decision filed September 16, 1975, applying the rationale of this Court's decision in Wood v. Strickland, 420 U.S. 308 (1975).

ARGUMENT

The Decisions Of This Court In Scheuer v. Rhodes And Wood v. Strickland Have Established The Requirements Of The Qualified Official Immunity Defense And Are Being Properly Applied By The Circuit Courts Of Appeals

A. The Sixth Circuit Applied The Proper Test In The Instant Case

The Petition for Writ of Certiorari asks this Court to consider this case on the merits in order "to resolve a conflict with the rulings of this Court and other circuits concerning the required proof of an affirmative defense of qualified immunity."

As is provided in pertinent part within United States Supreme Court Rule 19, "review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Respondents respectfully submit that there are no such important reasons for granting the writ in this case. Respondents take the position that the courts of appeals in the various circuits are properly applying the decisions of this Court on the doctrine of qualified official immunity. Specifically, respondents would note that there is no court of appeals decision in conflict with the decision rendered below by the Sixth Circuit.

This Court explained the doctrine of qualified official immunity in Scheuer v. Rhodes, 416 U.S. 232 (1974), as follows:

> "[A] qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope of discretion and responsibilities of office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S. at 247-248.

Then in Wood v. Strickland, 420 U.S. 308 (1975), this Court had occasion to consider the standard governing immunity for school board members from liability for compensatory damages under 42 U.S.C. § 1983.

Mr. Justice White delivered the opinion for the majority of the Court, which held as follows:

> "To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school

> and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." [Citation omitted.] A compensatory award will be appropriate only if the school board member has acted with such as impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322.

The Court of Appeals in the instant case relied upon the language quoted above from Wood and rendered its decision in favor of respondents. Petitioner is now claiming that the Sixth Circuit "failed to note the separate nature of each of the two parts of the inquiry required by the standards of Wood and Scheuer." Such is clearly not the case.

Judge Engel specifically noted the district judge's finding that "the defendants had acted in the good faith belief that their pregnancy policy was valid and should be adhered to by the Board." Thus the subjective portion of the Wood standard had already been resolved by the District Court.

Consequently the Court of Appeals focused on whether the school board action in enforcing the maternity leave policy "was at that time so in disregard of the 'settled, indisputable law' and 'unquestioned constitutional rights' that it cannot reasonably be characterized as being in good faith." (Petition for Writ of Certiorari, p. A-30).

Upon comparison of the maternity leave policy upheld by the District Court in La Fleur with the policy in question here, and applying the standard articulated in Wood, the Court of Appeals held as a matter of law that these respondents were entitled to the qualified immunity defense. Respondents respectfully submit that the Sixth Circuit has properly applied the test set forth in Wood to the facts of this case.

B. The Circuit Courts Of Appeals Are Not In Conflict

Petitioner cites three cases from other courts of appeals which are claimed to be in conflict with the instant case as decided by the Sixth Circuit. However, in each of the cases cited, as well as in the instant case, the Wood standard has been applied as articulated by this Court. The only differences in the cases are factual, and none involves the particular timing sequence of the La Fleur case and the maternity leave policies with which we are presently concerned.

In McCray v. Burrell, 516 F. 2d 357 (4th Cir. 1975) cert. granted, 44 U.S.L.W. 3263 (Nov. 3, 1975) (No. 77-44), the Fourth Circuit had prepared its majority opinion prior to this Court's decision in Wood. Without extended analysis, the Court of Appeals merely referred to Wood by way of addendum as support for its conclusions. The case was remanded to give the defendants therein (prison officials) the opportunity to prove their subjective good faith.

In Schiff v. Williams, 519 F. 2d 257 (5th Cir. 1975), a university president had dismissed the editors of the school newspaper in violation of their First Amendment rights. The president asserted the defense of qualified immunity. The Fifth Circuit placed emphasis upon the objective portion of the Wood standard, charging the president with "knowledge of the basic unquestioned constitu-

tional rights of his charges." 519 F. 2d at 261 (emphasis supplied by the Court). It held that the president could not avoid responsibility for his abridgement of First Amendment rights merely because he was not motivated by malice.

In Hostrop v. Board of Junior College District No. 515, 523 F. 2d 569 (7th Cir. 1975), a civil rights action was brought against school officials for alleged wrongful termination of an administrator's employment. The Seventh Circuit recognized the two-prong test espoused in Wood and noted as follows:

> "There is no evidence in the record at bar suggesting that the defendant school board members acted with malicious intent to violate plaintiff's constitutional rights and not sincerely with the belief that they were doing right. The question left after reviewing the facts of record is whether they reasonably should have known that the action they were taking would violate plaintiff's constitutional rights. That question must be answered in the light of the law as it existed in July 1970, when the action was taken." 523 F. 2d at 577.

The Court proceeded to examine the state of the law at the time in question and sustained the defense of immunity.

Respondents contend that none of these decisions conflict with the decision of the Sixth Circuit in the instant case.

CONCLUSION

Respondents respectfully submit that the Sixth Circuit Court of Appeals has properly applied the standard articulated by this Court in Wood v. Strickland. At the time the Board of Education requested petitioner's resignation pursuant to its maternity leave policy, the controlling judicial precedent in the Sixth Circuit was the District Court decision in La Fleur which had upheld a substantially similar policy. Without question the Board of Education was not then acting in desregard of any "clearly established constitutional rights" as that phrase is used in Wood. In fact, when La Fleur was reversed on appeal, the Board promptly changed its policy in compliance.

Respondents submit further that there is no conflict among the courts of appeals in interpreting the Wood decision. There are no special and important reasons for granting a writ of certiorari in this case, and respondents therefore pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief In Opposition To Petition For A Writ of Certiorari were sent by first class United States mail to Charles E. Guerrier, Attorney for Petitioner, 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio 44114, on this 12 day of January, 1976.

John C. Burkholder